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ALEXANDER L. STEVAS,
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No. 84-532

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

MARJORIE H. ROWLAND,
Petitioner,

v.

MAD RIVER LOCAL SCHOOL DISTRICT,
MONTGOMERY COUNTY, OHIO, A PUBLIC BODY CORPORATE,
Respondent.

PETITIONER'S REPLY BRIEF TO BRIEF OF RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Page

I. Table of Authorities ii

II. Introduction 1

III. Argument 2

A. If A Policy-Making Entity Or Individual Acts So As To Violate A Citizen's Constitutional Rights, The Municipality May Be Liable 2

B. Petitioner's Transcript References To The Testimony Concerning The Reason For Her Termination Are Not Taken Out Of Context .. 7

IV. Conclusion 8

I. TABLE OF AUTHORITIES

CASES: Page

Bennett v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984) 4, 6

Gilmere v. *City of Atlanta*, 737 F.2d 894 (11th Cir. 1984) 5, 6

McKinley v. *City of Eloy*, 705 F.2d 1110 (9th Cir. 1983) 4

Monell v. *New York City Department of Social Services*, 436 U.S. 658 (1978) ..... *passim*

Owen v. *City of Independence, Mo.*, 445 U.S. 622 (1980) ..... *passim*

Rookard v. *Health and Hospital Corp.*, 710 F.2d 41 (2d Cir. 1983) 4

Schneider v. *City of Atlanta*, 628 F.2d 915 (5th Cir. 1980) 3, 4

Trezevant v. *City of Tampa*, 741 F.2d 336 (11th Cir. 1984) 5

Williams v. *City of Valdosta*, 689 F.2d 964 (11th Cir. 1982) 4

STATUTE:

42 U.S.C. § 1983 ..... *passim*

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II. INTRODUCTION

Petitioner believes that only two of the respondent's arguments in its Brief in Opposition to the Petition for Certiorari require further discussion: the contours of municipal liability and respondent's misleading references to the transcript.

III. ARGUMENT

A. If A Policy-Making Entity Or Individual Acts So As To Violate A Citizen's Constitutional Rights, The Municipality May Be Liable.

Respondent erred in arguing that this Court's decisions in *Monell* v. *New York City Department of Social Services,* 436 U.S. 658 (1978) and *Owen* v. *City of Independence, Mo.,* 445 U.S. 622 (1980) support the holding of the Sixth Circuit Court of Appeals that the petitioner in the case at bar had to prove that the Board of Education established "a policy or custom . . . to exclude homosexuals from employment or to discriminate against persons who exercise free speech . . . ." *Brief of Respondent,* at 18.

This Court stated in *Monell, supra* that municipalities may be sued for violating 42 U.S.C. section 1983 in "execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy" and that "we expressly leave further development of . . . (the contours of municipal liability under section 1983) to another day." 436 U.S. at 694, 695.

This Court developed the contours of municipal liability further in *Owen, supra.* The Court held that a city could be liable for harm caused by a city council or a key decision-maker (in *Owen* the city manager) in unconstitutionally discharging a city employee. Respondent argued in its brief in opposition that *Owen* is distinguishable because, although the city manager actually discharged Owen, the city council gave the city manager authority to take ac-

tion against those whose activities came out in an investigative report. 445 U.S. at 629.

This is a distinction without a difference. In *Owen*, this Court emphasized that "(t)he innocent individual who is harmed by an abuse of governmental authority [such as a city manager or city council]" must be "assured that he will be compensated for his injury." and that damages would be "chargeable to the populace as a whole." *Id.* If the city school district were not liable for unconstitutional acts of key decision-makers, like the city manager or school superintendent, the victim would not be compensated. Furthermore, this Court in *Owen* did not require the petitioner to prove that the city or the city manager had an established practice or custom of discharging persons in violation of their Fourteenth Amendment right to Due Process. *Owen* appears to stand for the proposition that if a policy-making entity or individual acts so as to violate a citizen's constitutional rights, the municipality may be liable.

Petitioner has cited a number of decisions by circuit courts of appeals that have held that "governmental bodies that entrust key decision-makers with certain responsibilities are liable for unconstitutional acts by the decision-makers." *Petition for Certiorari*, at 28. In addition, the Fifth Circuit Court of Appeals, sitting *en banc*, recently cited with approval *Schneider* v. *City of Atlanta*, 628 F.2d 915, 920 (5th Cir. 1980) for its holding that "where a city officer 'is the final authority or ultimate repository of [city] power his official conduct and decisions must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy

for which the [city] may be held responsible under section 1983.'" *Bennett* v. *City of Slidell,* 728 F.2d 762, 766 (5th Cir. 1984) (en banc).

The Fifth Circuit Court of Appeals in *Bennett* then cited decisions in other circuits that have established the same contours of municipal liability for acts of top decision-makers as did the court in *Schneider.* See, *Rookard* v. *Health and Hospital Corp.,* 710 F.2d 41, 45 (2d Cir. 1983); *McKinley* v. *City of Eloy,* 705 F.2d 1110, 1116 (9th Cir. 1983); and *Williams* v. *City of Valdosta,* 689 F.2d 964, 969 (11th Cir. 1982). The Courts of Appeals in *Schneider, supra; Rookard, supra; McKinley, supra;* and *Williams, supra* held that cities were liable for single, unlawful discharges by officials who had been given final authority to discharge employees. None of the courts in these four cases required the plaintiff to show that the municipality had a policy or custom of discharging employees who tried to exercise their First Amendment rights or had a policy of discriminating against employees on account of their race or sex or sexual orientation. For instance, the Ninth Circuit Court of Appeals in *McKinley* stated that "the personnel decisions of the city manager represented 'official city policy'" because the city manager had the final authority over personnel decisions. *McKinley* v. *City of Eloy, supra,* at 1116. See, *Rookard* v. *Health and Hospital Corp., supra,* at 45 and *Williams* v. *Valdosta, supra,* at 969.

Although the Fifth Circuit Court of Appeals cited *Schneider, supra* and a number of related cases with approval, its language appears to severely limit *Monell, supra* and *Owen, supra.* (See the opinion of

five dissenting judges, beginning at 770.) For instance, the Court stated that "(i)solated violations are not the persistent, often repeated, constant violations that constitute custom and policy" [*Id.*, at 768, n.3], although none of the cases cited by the Court and listed above involved repeated violations of the Constitution.

Respondent cited a decision by the Eleventh Circuit Court of Appeals that also limited *Monell, supra* and *Owen, supra. Gilmere* v. *City of Atlanta,* 737 F.2d 894 (11th Cir. 1984). The Court held in *Gilmere, supra* that unless there are repeated violations of constitutional rights, a city would not be liable under section 1983. However, the Court has granted a motion for rehearing. *Id.,* at 912. Furthermore, a different panel of the same court held that an isolated violation of a constitutional right was sufficient to hold a city liable for conduct of its officials. *Trezevant* v. *City of Tampa,* 741 F.2d 336, 340 (11th Cir. 1984).

The decision by the Sixth Circuit Court of Appeals in the case at bar is contrary to most of the decisions by Courts of Appeals that have held municipalities liable for unconstitutional discharges of employees by administrators who had authority to do so. The superintendent and principal in the instant case had the final authority to suspend and to transfer the petitioner and to recommend that she be non-renewed. By suspending and transferring the petitioner because she is bisexual and because she told others of her bisexuality, the superintendent and principal made official policy of the school district and the school district is therefore liable. The peti-

tioner should not have been required to show that the school district had a practice or custom of removing homosexuals or bisexuals, as mandated by the majority of the Sixth Circuit panel. Other circuit courts have not required such an onerous showing. In fact, most of the cases that have limited *Monell, supra* and *Owen, supra* related to officials' abuse of power and did not involve the discharge of municipal employees, which is the situation in the case at bar.

In addition, respondent neglects to point out that as in *Owen* key decision-makers were not alone in violating the petitioner's constitutional rights. The respondent school district also violated her rights. The superinendent Dr. Hopper acted on behalf of the school board and on the advice of the school district's legal counsel in suspending petitioner. He consulted with the board prior to taking action (Vol. III p. 631) and informed the board after he suspended the petitioner (Vol. III, p. 638). He informed the board of the reasons for his actions. The board concurred with the superinendent's actions. Furthermore, the school board acted to non-renew the petitioner's contract, based on the recommendation of the superintendent.

Circuit Courts of Appeals have expressed their uncertainty as to the contours of municipal liability under section 1983. Even within the circuits, judges have expressed disagreement concerning the boundaries of *Monell* and *Owen*. See, the dissent of Judge Edwards in the case at bar, the order to rehear *Gilmere, supra* and the dissenting opinion in *Bennett, supra*. The instant case would give this Court the opportunity to develop further the contours of *Monell,*

supra and *Owens, supra* and to bring the Sixth Circuit into conformity with decisions of this Court and other circuit Courts of Appeals.

B. Petitioner's Transcript References To The Testimony Concerning The Reason For Her Termination Are Not Taken Out Of Context.

In section B-1 of its brief, respondent complains to this Court that petitioner's references to the trial transcript are "taken out of context and certainly cannot be considered a representation of the totality of the evidence . . ." (Respondent's brief, at 9). These portions of the transcript refer to the testimony that was given concerning the reason for Ms. Rowland's termination.

Respondent's statement that these references are taken out of context is misleading. At the time of Ms. Rowland's termination she was given one overriding reason for the respondent's action. School authorities acted because she was a bisexual guidance counselor. Other alleged concerns relating to her job performance were not mentioned or discussed. For instance, Larry Smith, attorney for the school board in 1975, testified that the overriding reason given by Dr. Hopper, the superintendent, was that she was a bisexual guidance counselor (A-57a).

Dr. Hopper's testimony was consistent with Larry Smith's version. He was concerned that petitioner was confronting staff members with her bisexuality. That was the sole motivating factor for Hopper's actions at the time (A-57a). Likewise, principal Di-Nino had concerns because petitioner was a bisexual guidance counselor (A-58a).

All of the above testimony related to the individual defendants' thoughts, conversations, and motivating factors which occurred contemporaneously with petitioner's suspension, transfer and termination. These remarks are certainly not taken out of the context of the events which are the subject of this action.

Petitioner acknowledges that at the time of the jury trial of this matter (6 years later) there was testimony by the individual defendants about other problems with petitioner's job performance. However, the evidence is undisputed that none of these concerns were communicated at the time of the petitioner's suspension or termination. The only reason given at the time was her bisexuality. The other factors mentioned by respondent all surfaced later as a *post facto* attempt to justify the termination.

IV. CONCLUSION

Petitioner requests that for all of the above reasons and those previously stated the Petition for a Writ of *Certiorari* be granted and the case be set down for argument.

Respectfully submitted,

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